



Business Regulation Committee

**Tuesday, February 21, 2006
9:00 AM - 12:00 PM
REED HALL**

Committee Meeting Notice

HOUSE OF REPRESENTATIVES

Speaker Allan G. Bense

Business Regulation Committee

Start Date and Time: Tuesday, February 21, 2006 09:00 am

End Date and Time: Tuesday, February 21, 2006 12:00 pm

Location: Reed Hall (102 HOB)

Duration: 3.00 hrs

Consideration of the following bill(s):

HB 173 CS Construction Contracts by Ross

HB 543 CS Condominiums by Goodlette

NOTICE FINALIZED on 02/10/2006 15:57 by REFFITT.NIKKI

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 173 CS

Construction Contracts

SPONSOR(S): Ross

TIED BILLS:

IDEN./SIM. BILLS: SB 682

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Insurance Committee	19 Y, 0 N, w/CS	Callaway	Cooper
2) Business Regulation Committee		Livingston <i>Call</i>	Liepshutz <i>MLK</i>
3) Civil Justice Committee			
4) Commerce Council			
5) _____			

SUMMARY ANALYSIS

The bill addresses the issue of a subcontractor's failure to obtain insurance required by a construction contract between the general contractor and the subcontractor. There are currently no specific statutory provisions relating to this issue. Remedies under other statutory provisions, such as contract law or lien law, may apply generically.

The bill gives a general contractor three business days to reject, in writing, a certificate of insurance given to him by a subcontractor. If a general contractor does not reject the certificate of insurance within the three day window, he or she is deemed to accept it, except under specified circumstances. The general contractor can still reject the certificate of insurance at a later date as long as the rejection is in writing.

The bill also requires general contractors who accept a subcontractor's certificate of insurance or who have deemed acceptance of it to pay the subcontractor for the work done, except under specified circumstances.

The bill's provisions also apply to certificates of insurance required by construction contracts between general contractors, subcontractors, sub-subcontractors, and materialmen.

There does not appear to be a fiscal impact on state or local government.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide Limited Government: The bill creates statutory provisions governing the actions of contractors who are parties to a construction contract relating to acceptance or rejection of certificates of insurance and the resulting payment for work done or materials supplied. There are currently no specific statutory provisions relating to this issue.

Safeguard Individual Liberty: The bill restricts when a general contractor can reject work done by a subcontractor or withhold payment for work done by a subcontractor due to the subcontractor not having insurance coverage required in the construction contract. The bill also provides a time limit when a general contractor must reject a certificate of insurance from a subcontractor. Noncompliance with the time limit provided results in a general contractor's deemed acceptance of the certificate of insurance.

B. EFFECT OF PROPOSED CHANGES:

Background

Most property owners, general contractors, and subcontractors carry numerous kinds of insurance, such as workers' compensation¹ and commercial liability. Insurance costs are factored into the contractors' bids on a construction project. Insurance requirements for a particular construction project are included in the resulting construction contracts between the owner and general contractor, the general contractor and subcontractor, and/or subcontractor and sub-subcontractor or materialman. For purposes of brevity, this analysis refers to the working relationship between a general contractor and a subcontractor. The same practices can occur when general contractors or subcontractors contract with sub-subcontractors or with materialmen and the sub-subcontractor or materialmen are required to provide policies or certificates of insurance as proof of insurance coverage.

Although there are no laws specifically addressing the practice, a general contractor or subcontractor may require, as a part of the construction contract, a certificate of insurance or an insurance policy to be submitted by a subcontractor as a condition of work. The certificate of insurance is evidence of insurance in lieu of an actual copy of an insurance policy. At some point upon signing a construction contract, sometimes before the work begins and sometimes after, the subcontractor provides a certificate of insurance to the general contractor listing the insurance provided by the subcontractor. Most times the general contractor reviews all documents required to be submitted under the construction contract, including the certificate of insurance, prior to paying the first invoice for each subcontractor. If an insurance policy or certificate of insurance is not submitted or if it does not meet the standards of the general contractor requiring the policy under the contract, the contractor may prohibit the other party from working on the construction project or may withhold payment for work already done until the proper insurance is obtained and proof is submitted.

¹ Employers in the construction industry with one or more employee must provide workers' compensation coverage for its' employees. s. 440.02(17)(b)2., F.S. (2005). If a subcontractor does not have workers' compensation coverage, the general contractor must provide workers' compensation benefits for any injured employee of the subcontractor. This is true even if the subcontractor lied to the general contractor about his or her workers' compensation insurance coverage or gave the general contractor a fraudulent certificate of workers' compensation insurance coverage. John J. Dubreuil, *Florida Workers' Compensation Handbook*, 3-43 (2003 Edition, 2003).

According to proponents of the bill, a practice of misuse of certificates of insurance by general contractors has emerged that is of serious concern to the subcontractors and their insurance agents.² This practice involves a general contractor demanding their subcontractors supply them with certificates of insurance containing non-standard and sometimes unavailable coverage provisions, such as hold harmless agreements or waiver of subrogation rights.

Specifically, the subcontractor is told by the general contractor that in order to work on the construction project, the subcontractor must supply evidence of a liability policy with certain provisions. The subcontractor purchases an insurance policy and receives a certificate of insurance from his or her insurance agent which contains information about what type of insurance coverage the policyholder/subcontractor has in force. The subcontractor usually gives the certificate of insurance to the general contractor before starting work on the construction project. However, circumstances do exist where the documentation may be submitted after commencement of the subcontractors' portion of the project.

According to the bill's proponents, once the subcontractor's work is complete, the general contractor often refuses payment to the subcontractor for work completed because the subcontractor did not carry insurance containing the general contractor's required specifications, even though the general contractor had the certificate of insurance from the outset of the subcontractor's work. The general contractor refuses payment to the subcontractor until the subcontractor provides the general contractor with a certificate of insurance meeting the general contractor's specifications.

The problem is further complicated when the subcontractor asks his or her insurance agent to give him or her a new certificate of insurance with the appropriate specifications, to provide him or her with a retroactive insurance policy with corresponding certificate of insurance meeting the specifications, or to alter his or her existing certificate of insurance to reflect the appropriate specifications. Most agents refuse to alter the certificates of insurance as doing so potentially subjects them to license discipline and administrative fines.³ Also, an agent doing so may incur an "errors and omission" problem.⁴

If an agent refuses to alter a certificate of insurance, the general contractor may ask the agent to issue a personal guarantee of the changes to the certificate of insurance the general contractor requires.⁵ A personal guarantee by the agent may expose him or her to suit if the insurer will not honor the changes required by the general contractor and personally guaranteed by the agent.

Proposed Legislation

The bill is designed to resolve the problem relating to certificates of insurance between contractors alleged by the bill's proponents. In that regard, the bill creates statutory provisions allowing a general contractor three business days to reject a certificate of insurance given to him by a subcontractor. The bill's provisions also apply to certificates of insurance required by construction contracts between general contractors, subcontractors, sub-subcontractors, and materialmen. The rejection must be in writing and must specify the reason(s) for rejection. The bill does not require the general contractor to allow the subcontractor time to cure any deficiency in the certificate of insurance causing rejection of it by the general contractor.

If a general contractor does not reject the certificate of insurance within the three day window, he or she automatically accepts it (i.e. deemed acceptance). The general contractor is still able to reject a certificate of insurance at a later date (after acceptance or automatic acceptance) as long as the

² Florida Association of Insurance Agents, *300 Words (more or less) about Certificates of Insurance* (2006) (on file with the Insurance Committee).

³ s. 626.9541(1)(a)1., F.S. (2005); s. 626.9521, F.S. (2005); Informational Memorandum OIR-03-003M, issued by the Office of Insurance Regulation on February 21, 2003 (on file with the Insurance Committee).

⁴ Florida Association of Insurance Agents, *300 Words (more or less) about Certificates of Insurance* (2006) (on file with the Insurance Committee).

⁵ *Id.*

rejection is in writing and specifies the reason(s) for rejection. However, the general contractor must pay the subcontractor for work done by the subcontractor up to the date of written rejection of the certificate of insurance by the general contractor.

The bill outlines circumstances where a general contractor can withhold payment or reject work that has been completed by a subcontractor despite the general contractor's acceptance or automatic acceptance of the certificate of insurance. These circumstances are:

- if the certificate of insurance does not comply with the insurance coverage limits specified in the construction contract;
- if the certificate of insurance was knowingly and fraudulently altered or reflects coverages not in the insurance policy; or
- if the insurance policy is cancelled, nonrenewed, or materially and adversely altered during the term of the construction contract.

The bill also requires general contractors who voluntarily accept a subcontractor's certificate of insurance at the outset or who automatically accept it by operation of law after the 3 day window to pay the subcontractor for work completed up to the time the general contractor rejects the insurance policy on the basis that it is nonconforming. The bill does not require the general contractor to pay the subcontractor for work done in the three day window allowed for rejection of the certificate of insurance. Thus, the subcontractor is at risk for not getting paid for work performed, if any, during this time period.

The bill outlines circumstances where a general contractor cannot be caused to automatically accept a certificate of insurance even if he or she does not reject during the three day rejection window. These circumstances are:

- if the certificate of insurance does not comply with the insurance coverage limits specified in the construction contract,
- if the certificate of insurance was knowingly and fraudulently altered, or
- if the certificate of insurance reflects coverages not in the insurance policy

C. SECTION DIRECTORY:

Section 1. Creates s. 627.442, F.S. providing provisions regarding acceptance and/or rejection of certificates of insurance by parties to a construction contract and payment on construction contracts.

Section 2. Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may create costs to a general contractor or subcontractor when a subcontractor, sub-subcontractor, or materialman does not have the proper insurance. The increased costs may include costs associated with hiring a subcontractor, sub-subcontractor, or materialman that carries the required insurance. However, the bill's provisions precluding the general contractor or subcontractor from withholding payment for work completed by subcontractors, sub-subcontractors, or materialmen may have a positive financial impact on those parties by guaranteeing payment for services rendered.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities

2. Other:

None.

B. RULE-MAKING AUTHORITY:

NA.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 26, 2006, the Insurance Committee considered the bill, adopted a strike-all amendment, and reported the bill favorably with CS. The strike-all amendment made the following changes to the original text of the bill:

- specified the general contractor has 3 business days to reject a certificate of insurance, rather than 3 days as provided in the original bill text
- clarified that a subcontractor will be paid for work done before the certificate of insurance is accepted or deemed to be accepted
- clarified that a general contractor can reject a certificate of insurance even after he originally accepted it or was deemed to have accepted it
- created exceptions to the provision relating to deemed acceptance of a certificate of insurance by a general contractor. The exceptions are a policy or certificate "that does not comply with the insurance coverage limits specified in the construction contract, that was knowingly and

fraudulently altered, or that reflects coverages or conditions that are not contained in the underlying policy."

- created exceptions to the provision requiring a general contractor to pay a subcontractor for work performed. The exceptions allow a general contractor to withhold payment or reject work completed by a subcontractor if the policy or certificate: "(a) Does not comply with the insurance coverage limits specified in the construction contract; (b) Was knowingly and fraudulently altered or reflects coverages or conditions that are not contained in the underlying policy; or (c) Is cancelled, nonrenewed, or materially and adversely altered during the term of the construction contract."
- deleted the provision in the original bill making the construction contract provision requiring insurance unenforceable if the certificate of insurance is rejected.

The staff analysis was updated to reflect the changes.

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CHAMBER ACTION

The Insurance Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to construction contracts; creating s. 627.442, F.S.; specifying acceptance of certain insurance provisions of a construction contract under certain circumstances; providing exceptions; prohibiting certain actions after acceptance of such provisions; providing an exception authorizing such actions under certain circumstances; authorizing contractors or subcontractors to reject certain accepted construction contract insurance provisions as nonconforming under certain circumstances; authorizing such contractors and subcontractors to withhold payment for work performed or materials supplied under certain circumstances; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 627.442, Florida Statutes, is created to read:

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23 627.442 Construction contract insurance provisions;
24 acceptance, rejection, or application.--

25 (1) If a written construction contract requires a
26 subcontractor, sub-subcontractor, or materialman to provide an
27 insurance policy or certificate of insurance to the general
28 contractor or another subcontractor for work performed or
29 materials provided, which extends coverage rights to an
30 additional insured, the general contractor or subcontractor is
31 deemed to have accepted the insurance policy or certificate of
32 insurance as conforming to the written construction contract
33 unless the general contractor or subcontractor rejects the
34 insurance policy or certificate of insurance in writing within 3
35 business days after receipt of the insurance policy or
36 certificate of insurance. The written rejection must specify the
37 reason for rejection. However, the general contractor or
38 subcontractor may not be deemed to have accepted an insurance
39 policy or certificate of insurance that does not comply with the
40 insurance coverage limits specified in the construction
41 contract, that was knowingly and fraudulently altered, or that
42 reflects coverages or conditions that are not contained in the
43 underlying policy.

44 (2) After a general contractor or subcontractor accepts an
45 insurance policy or certificate of insurance or is deemed to
46 have accepted the insurance policy or certificate of insurance,
47 a general contractor or subcontractor may not use the lack of
48 conforming insurance as a reason to reject work previously
49 completed by a subcontractor or sub-subcontractor, reject
50 materials previously supplied by a materialman, or withhold

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payment for work previously completed or materials previously
supplied. However, the general contractor or subcontractor may
reject work previously completed or materials previously
supplied or withhold payment for such work or materials if the
policy or certificate provided by the subcontractor, sub-
subcontractor, or materialman:

(a) Does not comply with the insurance coverage limits
specified in the construction contract;

(b) Was knowingly and fraudulently altered or reflects
coverages or conditions that are not contained in the underlying
policy; or

(c) Is cancelled, nonrenewed, or materially and adversely
altered during the term of the construction contract.

(3) Subsection (1) does not preclude a general contractor
or subcontractor from rejecting as nonconforming an insurance
policy or certificate of insurance previously accepted or deemed
to have been accepted; however, such a rejection shall be in
writing and shall specify the reason for rejection. A general
contractor or subcontractor who rejects in writing an insurance
policy or certificate of insurance as nonconforming and states
the specific reason for such rejection may withhold payment for
the work performed or materials supplied after the date of the
rejection of the policy or certificate.

Section 2. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

Bill No. HB 173

COUNCIL/COMMITTEE ACTION

ADOPTED _____ (Y/N)
ADOPTED AS AMENDED _____ (Y/N)
ADOPTED W/O OBJECTION _____ (Y/N)
FAILED TO ADOPT _____ (Y/N)
WITHDRAWN _____ (Y/N)
OTHER _____

Council/Committee hearing bill: Business Regulation
Representative(s) Troutman and Representative Greenstein offered
the following:

Amendment (with title amendment)

Between lines 73 and 74, insert:

(4) A policy of insurance issued by an authorized insurer
or self-insurance fund that is subject to ss. 631.901-631.932
may not be rejected as nonconforming by a general contractor on
the grounds that such authorized insurer or self-insurance fund
is rated or not rated by a nationally recognized insurance
rating service.

===== T I T L E A M E N D M E N T =====

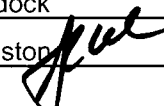
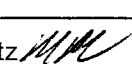
Remove line 17 and insert:

under certain circumstances; prohibiting rejection of
certain policies of insurance on certain grounds; providing
an effective date.

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HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 543 CS Condominiums
SPONSOR(S): Goodlette
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1556

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	6 Y, 0 N, w/CS	Shaddock	Bond
2) Business Regulation Committee		Livingston 	Liepshutz 
3) Justice Council			
4) _____			
5) _____			

SUMMARY ANALYSIS

Ownership of a condominium unit is a unique form of real estate ownership. A condominium owner is entitled to both the exclusive ownership and possession of a unit and an undivided interest as a tenant in common with the other unit owners in the common areas. In other words, a condominium is a single real-estate unit contained within a multi-unit condominium in which a person has both separate ownership of a unit and a common interest, along with the condominium's other owners, in the common areas.

Currently, in order to terminate a condominium, even after a catastrophic event, the consent of all the unit owners and all the holders of the recorded liens affecting any of the condo parcels is required. This bill amends the law regarding condominium termination to:

- Authorize the termination a condominium for economic waste or impossibility;
- Provide alternative methods for the allocation of proceeds from the sale of condominium property;
- Lower the total vote requirement for termination of a condominium depending on the circumstances; and
- Provide a method by which a court may entertain a petition to approve a plan of termination of a condominium.

This bill does not appear to have a fiscal impact on state or local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty -- This bill increases the probability that condominium unit owners will have increased flexibility in terminating the condominium for economic waste or impossibility.

B. EFFECT OF PROPOSED CHANGES:

Condominiums are creatures of statute, and are thereby subject to the control and regulation of the legislature, which has broad discretion in its regulatory efforts, especially in fashioning remedies necessary to protect the interests of those persons involved. "The condominium concept must operate within the applicable statutory and constitutional provisions."¹

Basically, a condominium is a parcel of real estate that has been subdivided into contiguous lots. The area above the land can be "subdivided into a number of three-dimensional air spaces, each susceptible of being separately conveyed and incumbered."²

Condominium unit owners operate as a democracy, of necessity more restrictive in the use of condominium property than might be acceptable given traditional forms of property ownership. Thus, a condominium owner "relinquishes some degree of freedom of choice and agrees to subordinate some of his traditional ownership rights when he elects condominium ownership. While a titleholder of a condominium unit has fundamental property rights, he enjoys them coextensively with other members of the condominium project, and thus does not have an exclusive interest in the condominium property."³

A "declarant" is a grantor that establishes or joins in the creation of a declaration of condominium. A "unit" refers to the physical portion of a condominium designated for separate ownership or occupancy. An individual who purchases or owns an apartment in a condominium is generally referred to as a "unit owner."⁴

Current Law Regarding Termination

Chapter 718, F.S., the "Condominium Act," governs condominium associations. Section 718.117, F.S. provides the general rules and procedures relating to the termination of a condominium, and those provisions are set forth below.

Termination

In order to terminate a condominium, the consent of all the unit owners and all the holders of the recorded liens affecting any of the condo parcels is required.⁵

Vacancy on the Board

Unless provided otherwise, a vacancy in the board during a winding up proceeding, resulting from the resignation or expiration of term of any director, can be filled by a majority vote of the unit owners.⁶

¹ 31 CJS § 193, Estates.

² *Id.*

³ *Id.*

⁴ 15a Am. Jur. 2d s. 1, Condo.

⁵ See s. 718.117(1), F.S., unless the declaration provides otherwise.

⁶ Section 718.117(3), F.S.

Natural Disaster

If, after a natural disaster, the identity of the directors or their right to hold office is in doubt, or if they are deceased or unable to act, or if they fail or refuse to act, or their whereabouts cannot be ascertained, any interested person may petition the circuit court to determine the identity of the directors, or, if determined to be in the best interest of the unit owners, to appoint a receiver to wind up the affairs of the association after hearing upon such notice to such persons as the court may direct.

The receiver will be vested with the powers of the board of directors, as provided in the declaration and bylaws and statute and such other powers that are necessary to wind up the affairs of the association. The order appointing the receiver will provide for the payment of a reasonable fee for the services of the receiver from the sources identified in the order, which may include rents, profits, incomes, maintenance fees, or special assessments collected from the condominium property.⁷

Terminated Association

An association that has been terminated continues to exist, however, for the limited purpose of winding up its affairs, prosecuting and defending actions by or against it, and enabling it to collect and discharge obligations, to dispose of and convey its property, and to collect and divide its assets"⁸

Distribution of Assets

After determining that all known debts and liabilities of an association in the process of winding up have been paid or provided for, all remaining assets must be distributed.⁹ If the winding up is pursuant to a court proceeding, the distribution may not be made until after any prescribed period ordered by the court for the presentation of claims.¹⁰

Assets held by an association upon a valid condition requiring return which condition has occurred or will occur, need to be returned in accordance with the condition.¹¹ The remaining assets are to be distributed in the following manner: (1) if the declaration or bylaws provides the manner of disposition, the assets are to be disposed of in that manner; and (2) if the declaration or bylaws do not provide the manner of disposition, the assets are to be distributed among the unit in the same shares as each owner previously owned in the common elements.¹² All liens must be transferred to the share in the condominium property attributable to the unit originally encumbered by the lien in its same priority

The distribution of the assets can be made by money, property, or securities, and the distribution can be in installments or as a whole. But distribution must be made as soon as reasonably consistent with the beneficial liquidation of the assets.¹³

Effect of the Bill

The bill amends s. 718.117, F.S. regarding the method and process for termination of a condominium. Initially it should be noted, that s. 718.117(1), F.S. provides legislative findings that "it is contrary to the public policy of this state to require the continued operation of a condominium when to do so would constitute economic waste or when the ability to do so is made impossible by law or regulation." This

⁷ Section 718.117(4), F.S.

⁸ Section 718.117(9), F.S.

⁹ 10 Fla. Jur. 2d s. 43, Condominiums, Etc., (referencing s. 718.117(5), F.S.).

¹⁰ Section 718.117(5), F.S.

¹¹ Section 718.117(6), F.S.

¹² Section 718.117(6)(a), (b), (7), F.S.

¹³ 10 Fla. Jur. 2d s. 43, Condominiums, Etc. (citing s. 718.117(8), F.S.).

section, further, provides that it will apply to all condominiums in Florida in existence or after the effective date of this act.¹⁴

Termination Condominium

This bill provides, notwithstanding any contrary provision in the declaration, a condominium may be terminated by a plan of termination (hereinafter "plan of termination" or "plan") approved by either the lesser of a majority of the total voting interests or as otherwise provided in the declaration, in the following circumstances: (1) when the total estimated cost of repairs necessary to restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of all units in the condominium after completion of the repairs; or (2) when it becomes impossible to operate or reconstruct a condominium in its prior physical configuration because of land-use laws or regulations.¹⁵

Condominiums that are Timeshares

Notwithstanding the provisions above, a condominium in which 75% or more of the units are timeshare units may only be terminated by a plan of termination that is approved by 80% of the total voting interests of the association and the holders of 80% of the original principal amount of outstanding recorded mortgage liens of timeshare estates in the condominium (unless the declaration provides for a lower voting percentage).¹⁶

Optional Termination

Except as provided elsewhere in this bill¹⁷ or unless the declaration provides for a lower percentage, a condominium may be terminated by a plan of termination approved by at least 80% of the total voting interests of the condominium.¹⁸

Jurisdiction of Court

If 80% of the total voting interests fail to approve a plan of termination but fewer than 20% of the total voting interests vote to disapprove a plan, the circuit court will have jurisdiction to entertain a petition by the association or by one or more unit owners and approve the plan of termination.¹⁹ This action may be a class action.²⁰

All unit owners and the association must be parties to the action, and the action may be brought against the nonconsenting unit owners. Service of process on unit owners may be by publication, but the plaintiff must furnish each unit owner not personally served with process a copy of the petition and plan of termination, and after entry of judgment, a copy of the final decree of the court, by mail at the owner's last known address.²¹

¹⁴ Section 718.117(1), F.S.

¹⁵ Section 718.117(2)(a), F.S.

¹⁶ Section 718.117(2)(b), F.S.

¹⁷ See ss. 718.117(2) and (4), F.S.

¹⁸ Section 718.117(3), F.S. This portion does not apply to condominiums in which 75% or more of the units are timeshare units.

¹⁹ Section 718.117(4)(a), F.S.

²⁰ *Id.*

²¹ Section 718.117(4)(b), F.S.

Mortgage Leinholders

After the consideration of whether the rights and interests of unit owners are equitably addressed in the plan, the plan of termination may be approved or rejected by the court. The court may modify the plan to provide for an equitable distribution of the interests of unit owners prior to approving the plan.^{22 23}

Associations Powers of Termination

Approval of a plan by the holder of a recorded mortgage lien affecting a condominium parcel in which fewer than 75% of the units are timeshare units is not required unless the plan of termination will result in less than the full satisfaction of the mortgage lien; notwithstanding any contrary provision in the declaration or ch. 718, F.S.²⁴

The condominium association will continue in existence following approval of the plan, with all powers it had before. Notwithstanding any contrary provision, after approval of the plan, the board has essentially the same powers and duties currently provided for in s. 718.117(2).²⁵

Natural Disaster

The bill provides a contingency framework, s. 718.117(8), F.S., for the directors of the association in the event of a natural disaster. That framework is essentially identical to the existing one contained in s. 718.117(4), F.S.

Plan of Termination

The plan must be a written document executed in the same manner as a deed by unit owners having the requisite percentage of voting interests to approve the plan and by the termination trustee.²⁶ A copy of the proposed plan must be given to all unit owners in the same manner as for notice of an annual meeting. That notice must be provided at least 14 days prior to the meeting during which the plan is to be voted upon. Or notice must be provided prior to or simultaneously with the distribution of the solicitation seeking execution of the plan or written consent to or joinder in the plan.²⁷ A unit owner may agree to the plan by executing the plan or by consent to or joinder in the plan in the manner of a deed. A plan of termination and the consents or joinders of unit owners and, if required, consents or joinders of mortgagees must be recorded in the public records of each county in which any portion of the condominium is located. The plan is effective only upon recordation or at a later date specified in the plan.²⁸

²² Section 718.117(4)(c), F.S.

²³ Nevertheless, this subsection does not apply to condominiums in which 75% or more of the units are timeshare units, s. 718.117(4)(d), F.S.

²⁴ Section 718.117(6), F.S.

²⁵ Section 718.117(7), F.S. Those powers and duties include the ability to: employ directors, agents, attorneys, and other professionals to liquidate or conclude its affairs; conduct the affairs of the association as necessary for the liquidation or termination; carry out contracts and collect, pay, and settle debts and claims for and against the association; defend suits brought against the association; sue in the name of the association for all sums due or owed to the association or to recover any of its property; perform any act necessary to maintain, repair, or demolish unsafe or uninhabitable improvements or other condominium property in compliance with applicable codes; sell at public or private sale or to exchange, convey, or otherwise dispose of assets of the association for an amount deemed to be in the best interests of the association, and to execute bills of sale and deeds of conveyance in the name of the association; collect and receive rents, profits, accounts receivable, income, maintenance fees, special assessments, or insurance proceeds for the association; and contract and do anything in the name of the association which is proper or convenient to terminate the affairs of the association.

²⁶ Section 718.117(9), F.S.

²⁷ *Id.*

²⁸ *Id.*

A plan must specify:²⁹

- The name, address, and powers of the termination trustee;
- A date after which the plan of termination is void if it has not been recorded;
- The interests of the respective unit owners in the association property, common surplus, and other assets of the association, which will be the same as the respective interests of the unit owners in the common elements immediately before the termination, unless otherwise provided;
- The interests of the respective unit owners in any proceeds from any sale of the condominium property. The plan of termination may apportion those proceeds pursuant to any of the methods prescribed in s. 718.117(12) (see the discussion below regarding the allocation of property). If, condominium property or real property owned by the association is to be sold following termination, the plan must provide for the sale and may establish any minimum sale terms; and
- Any interests of the respective unit owners in any insurance proceeds or condemnation proceeds that are not used for repair or reconstruction. Unless the declaration expressly addresses the distribution of insurance proceeds or condemnation proceeds, the plan of termination may apportion those proceeds pursuant to any of the methods prescribed in s. 718.117(12) (see the discussion below regarding the allocation of property).³⁰

The plan may provide that each unit owner retains the exclusive right of possession to the portion of the real estate that formerly constituted the unit, in which case the plan must specify the conditions of possession.³¹

In the case of a conditional termination, the plan must specify the conditions for termination. A conditional plan will not vest title in the termination trustee until the plan and a certificate executed by the association with the formalities of a deed, confirming that the conditions in the conditional plan have been satisfied or waived by the requisite percentage of the voting interests, have been recorded.³²

Allocation of Proceeds of Sale of Condominium Property

Unless the declaration expressly provides for the allocation of the proceeds of sale of condominium property, the plan must first apportion the proceeds between the aggregate value of all units and the value of the common elements, based on their respective fair-market values immediately before the termination.³³ The market values are to be determined by one or more independent appraisers selected by the association or termination trustee.³⁴

The portion of proceeds allocated to the units will be further apportioned among the individual units. The apportionment is deemed fair and reasonable if it is determined by any of the following methods: 1) the respective values of the units based on the fair-market values of the units immediately before the termination, as determined by one or more independent appraisers selected by the association or termination trustee; 2) the respective values of the units based on the most recent market value of the units before the termination, as provided in the county property appraiser's records; or 3) the respective interests of the units in the common elements specified in the declaration immediately before the termination.³⁵

²⁹ Section 718.117(10), F.S.

³⁰ *Id.*

³¹ Section 718.117(11)(a), F.S.

³² Section 718.117(11)(b), F.S.

³³ Section 718.117(12)(a), F.S.

³⁴ *Id.*

³⁵ Section 718.117(12)(b), F.S.

The three methods of apportionment listed above do not prohibit any other method of apportioning the proceeds of sale allocated to the units agreed upon in the plan of termination. However, the portion of the proceeds from the common elements will be divided among the units based upon their respective interests in the common elements as provided in the declaration.³⁶

Liens that encumber a unit are transferred to the proceeds of the sale of the condominium property and the proceeds of sale or other distribution of association property, common surplus, or other association assets attributable to such unit in their same priority. The proceeds of any sale of condominium property pursuant to a plan of termination may not be deemed to be common surplus or association property.³⁷

Termination Trustee

The association will serve as termination trustee unless another person is appointed in the plan of termination. If the association is unable, unwilling, or fails to act as trustee, any unit owner may petition the court to appoint a trustee. Upon recording or at a later date specified in the plan, title to the condominium property vests in the trustee. Unless prohibited by the plan, the termination trustee will be vested with the powers given to the board.³⁸

If the association does not serve as the termination trustee, the trustee's powers are coextensive with those of the association to the extent not prohibited in the plan or the order of appointment. If the association is not the termination trustee, the association will transfer any association property to the trustee. If the association is dissolved, the trustee will also have the powers necessary to conclude the affairs of the association.³⁹

Title Vested in Termination Trustee

If termination is pursuant to a plan, the unit owners' rights and title as tenants in common in undivided interests in the condominium property vest in the termination trustee when the plan is recorded or at a later date specified in the plan. The unit owners thereafter become the beneficiaries of the proceeds realized from the plan of termination. The termination trustee may deal with the condominium property or any interest therein if the plan confers on the trustee the authority to protect, conserve, manage, sell, or dispose of the condominium property. The trustee, on behalf of the unit owners, may contract for the sale of real property, but the contract is not binding on the unit owners until the plan is approved.⁴⁰

Notice

Within 30 days after a plan has been recorded, the termination trustee must deliver by certified mail, return receipt requested, notice to all unit owners, lienors of the condominium property, and lienors of all units at their last known addresses that a plan has been recorded. The notice must include the book and page number of the public records in which the plan was recorded, notice that a copy of the plan must be furnished upon written request, and notice that the unit owner or lienor has the right to contest the fairness of the plan.⁴¹

Within 90 days after the effective date of the plan, the trustee must provide to the division⁴² a certified copy of the recorded plan, the date the plan was recorded, and the county, book, and page number of the public records in which the plan was recorded.⁴³

³⁶ Section 718.117(12)(c), F.S.

³⁷ Section 718.117(12)(d), F.S.

³⁸ Section 718.117(13), F.S.

³⁹ *Id.*

⁴⁰ Section 718.117(14), F.S.

⁴¹ Section 718.117(15)(a), F.S.

⁴² Division refers to the Division of Florida Land Sales, Condominiums, and Mobile Homes of the Department of Business and Professional Regulation. Section 718.103(17), F.S.

Right to Contest

A unit owner or lienor may contest a plan by initiating a summary procedure, pursuant to s. 51.011, F.S., within 90 days after the date the plan is recorded. A unit owner or lienor who fails to contest the plan within that period is barred from asserting or prosecuting a claim against the association, the termination trustee, any unit owner, or any successor in interest to the condominium property.⁴⁴

In an action contesting a plan, the person contesting the plan has the burden of pleading and proving that the apportionment of the proceeds from the sale among the unit owners was not fair and reasonable. However, the apportionment of sale proceeds is presumed fair and reasonable if it was determined pursuant to the methods prescribed in s. 718.117(12) (see the discussion above regarding the allocation of property).⁴⁵

The court must adjudge the rights and interests of the parties and order the plan to be implemented if it is fair and reasonable, but the court must void a plan that is determined not to be fair and reasonable. In such an action, the prevailing party may recover reasonable attorney's fees and costs.⁴⁶

Distribution

Following termination, the condominium property, association property, common surplus, and other assets of the association are held by the termination trustee, as trustee for unit owners and holders of liens on the units, in their order of priority.⁴⁷

Not less than 30 days prior to the first distribution, the termination trustee must deliver by certified mail, return receipt requested, a notice of the estimated distribution to all unit owners, lienors of the condominium property, and lienors of each unit at their last known addresses stating a good-faith estimate of the amount of the distributions to each class and the procedures and deadline for notifying the termination trustee of any objections to the amount.⁴⁸ The deadline must be at least 15 days after the date the notice was mailed.⁴⁹

If a unit owner or lienor files a timely objection with the termination trustee, the trustee does not have to distribute the funds and property allocated to the respective unit owner or lienor until the trustee has had a reasonable time to determine the validity of the adverse claim.⁵⁰ In the alternative, the trustee may interplead the unit owner, lienor, and any other person claiming an interest in the unit and deposit the funds allocated to the unit in the court registry, at which time the condominium property, association property, common surplus, and other assets of the association are free of all claims and liens of the parties to the suit. In an interpleader action, the trustee and prevailing party may recover reasonable attorney's fees and costs and court costs.⁵¹

The proceeds of any sale of condominium property or association property and any remaining condominium property or association property, common surplus, and other assets must be distributed in the following priority:⁵²

1. To pay the costs of implementing the plan, including demolition, removal, and disposal fees, termination trustee's fees and costs, accounting fees and costs, and attorney's fees and costs;

⁴³ Section 718.117(15)(b), F.S.

⁴⁴ Section 718.117(16), F.S.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Section 718.117(17)(a), F.S.

⁴⁸ Section 718.117(17)(b), F.S.

⁴⁹ Section 718.117(17)(b), F.S.; the notice may be sent with or after the notice required by s. 718.117(15).

⁵⁰ Section 718.117(17)(b), F.S.

⁵¹ *Id.*

⁵² Section 718.117(17)(c), F.S.

2. To lienholders of liens recorded prior to the recording of the declaration;
3. To lienholders of liens of the association which have been consented to;⁵³
4. To creditors of the association, as their interests appear;
5. To unit owners, the proceeds of any sale of condominium property subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or lienor;
6. To unit owners, the remaining condominium property, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor;
7. To unit owners, the proceeds of any sale of association property, the remaining association property, common surplus, and other assets of the association, subject to satisfaction of liens on each unit in their order of priority, in shares specified in the plan of termination, unless objected to by a unit owner or a lienor.

After determining that all known debts and liabilities of an association in the process of termination have been paid or adequately provided for, the termination trustee will distribute the remaining assets pursuant to the plan.⁵⁴ If the termination is by court proceeding, the distribution may not be made until any period for the presentation of claims ordered by the court has elapsed.⁵⁵

Assets held by an association upon a valid condition requiring return, transfer, or conveyance, which condition has occurred or will occur, will be returned, transferred, or conveyed in accordance with the condition. The remaining association assets shall be distributed pursuant to the priority order above.⁵⁶

Distribution may be made in money, property, or securities and in installments or as a lump sum, if it can be done fairly and ratably and in conformity with the plan of termination. Distribution shall be made as soon as is reasonably consistent with the beneficial liquidation of the assets.⁵⁷

Association Status

The termination of a condominium does not change the corporate status of the association that operated the condominium property. The association continues to exist to conclude its affairs, prosecute and defend actions by or against it, collect and discharge obligations, dispose of and convey its property, and collect and divide its assets, but not to act except as necessary to conclude its affairs.⁵⁸

Creation of Another Condominium

The termination of a condominium does not bar the creation, by the termination trustee, of another condominium affecting any portion of the same property.⁵⁹

⁵³ Section 718.121(1), F.S., requires the unanimous consent of the unit owners before a lien is valid against the condominium as a whole.

⁵⁴ Section 718.117(17)(d), F.S.

⁵⁵ *Id.*

⁵⁶ Section 718.117(17)(e), F.S.

⁵⁷ Section 718.117(17)(f), F.S.

⁵⁸ Section 718.117(18), F.S., this section is essentially s. 718.117(9), F.S.

⁵⁹ Section 718.117(19), F.S., is essentially s. 718.117(10), F.S.

Exclusion

This section does not apply to the termination of a condominium incident to a merger of that condominium with one or more other condominiums under s. 718.110(7), F.S.⁶⁰

C. SECTION DIRECTORY:

Section 1: Amends s. 718.117, F.S., to provide for termination of a condominium.

Section 2: Provides an effective date of July 1, 2006.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

This bill provides increased opportunity for condominium owners who are a part of an uneconomic condominium to terminate that condominium; thereby allowing for greater flexibility in the investment or reinvestment of capital.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

⁶⁰ Section 718.117(20), F.S., is essentially s. 718.117(11), F.S.

2. Other:

Article I, Section 10 of the Florida Constitution provides: "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."⁶¹ "A statute contravenes the constitutional prohibition against impairment of contracts when it has the effect of rewriting antecedent contracts, that is, of changing the substantive rights of the parties to existing contracts."^{62 63} While the right to contract and use one's property as an individual sees fit is a "fundamental right" guaranteed by both the United States and Florida constitutions, the "degree of such guarantees must be determined in the light of social and economic conditions which prevail at a given time."⁶⁴

The Supreme Court of Florida in *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774 (Fla. 1979) held that laws impairing contracts can be unconstitutional if they unreasonably and unnecessarily impair the contractual rights of citizens.⁶⁵ The *Pomponio* Court indicated that the "well-accepted" principle in this state is that virtually no degree of contract impairment is tolerable in this state." *Pomponio*, 378 So. 2d at 780. When seeking to determine what level of impairment is constitutionally permissible, a court "must weigh the degree to which a party's contract rights are statutorily impaired against both the source of authority under which the state purports to alter the contractual relationship and the evil which it seeks to remedy." *Id.*

In other words, "[t]his method requires a balancing of a person's interest not to have his contracts impaired with the state's interest in exercising its legitimate police power." *U.S. Fidelity and Guar. Co. v. Department of Ins.*, 453 So. 2d 1355, 1360-61 (1984). What should be reviewed when considering this balancing test?

[T]he United States Supreme Court recently outlined the main factors to be considered in applying this balancing test. The threshold inquiry is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected. Total destruction of contractual expectations is not necessary for a finding of substantial impairment. On the other hand, state regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment. In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. The Court long ago observed: One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation such as the remedying of a broad and general social or economic problem. Furthermore, since *Blaisdell*, the Court has indicated that the public purpose need not be addressed to an emergency or temporary situation. One legitimate state interest is the elimination of unforeseen windfall profits. The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests. Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public

⁶¹ Article 1, Section 10(1) of the U.S. Constitution provides: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts"

⁶² 10a Fla. Jur. s. 414, Constitutional Law.

⁶³ The term impair is defined as "to make worse; to diminish in quantity, value, excellence, or strength; or to lessen in power or weaken." 10a Fla. Jur. s. 414, Constitutional Law.

⁶⁴ *Palm Beach Mobile Homes, Inc. v. Strong*, 300 So. 2d 881, 884 (Fla. 1974).

⁶⁵ The Florida Supreme Court has adopted the method of analysis from the United States Supreme Court in cases involving the contract clause. *Pomponio*, 378 So. 2d at 780.

purpose justifying [the legislation's] adoption. Unless the State itself is a contracting party, as is customary in reviewing economic and social regulation, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.

U.S. Fidelity and Guar. Co., 453 So.2d at 1360-61 (Fla. 1984) (internal citations and quotations omitted).

The language of the proposed s. 718.117, F.S., specifically the requirement that "this section shall apply to all condominiums in this state in existence on or after the effective date of this act,"⁶⁶ would seem to qualify under the Florida Supreme Court's definition of impairment of contract.⁶⁷ Therefore, the critical inquiry would seem to be the balancing test performed by the courts to determine the permissibility of the impairment. While not an exhaustive list, this bill would seem to have at least two significant factors which would mitigate in its favor. First, all condominiums are created by statute and subject to the control of the legislature.⁶⁸ Second, the bill makes a legislative finding that the public policy of this state is driving the changes in this bill.⁶⁹

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On January 25, 2005, the Civil Justice Committee adopted two amendments which modified the bill in the following manner:

- To require that the plan of termination specify any interest of the respective unit owners in any insurance proceeds or condemnation proceeds that are not used for repair or reconstruction at the time of termination.
- To provide that when the portion of proceeds allocated to the units will be further apportioned among the individual units, that apportionment is deemed to be fair and reasonable if it is determined by the unit owners who are approving the plan of termination provided that is by one of three delineated methods.

The bill was then reported favorably with a committee substitute.

⁶⁶ Section 718.117(1), F.S.

⁶⁷ As the Fourth District Court of Appeal noted it is only the retroactive application of a statute "which gives rise to questions of unreasonable impairment of contract obligations and remedies." *Cenville Investors, Inc. v. Condominium Owners Org. of Century Village East, Inc.*, 556 So. 2d 1197, 1200 (Fla. 4th DCA 1990).

⁶⁸ Section 718.104, F.S. provides "[e]very condominium created in this state shall be created pursuant to this chapter." See *Winkelman v. Toll*, 661 So. 2d 102, 105 (Fla. 4th DCA 1995)(stating "[a] condominium is strictly a create of statute.").

⁶⁹ The Supreme Court of Florida referenced *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) which cited to *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934) for the proposition that "laws intended to regulate existing contractual relationships must serve a legitimate public purpose . . . Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *Pomponio*, 378 So. 2d at 778.

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CHAMBER ACTION

The Civil Justice Committee recommends the following:

Council/Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to condominiums; amending s. 718.117, F.S.; substantially revising provisions relating to the termination of the condominium form of ownership of a property; providing legislative findings; providing grounds; providing powers and duties of the board of administration of the association; waiving certain notice requirements following natural disasters; providing requirements for a plan of termination; providing for the allocation of proceeds from the sale of condominium property; providing powers and duties of a termination trustee; providing notice requirements; providing a procedure for contesting a plan of termination; providing rules for the distribution of property and sale proceeds; providing for the association's status following termination; allowing the creation of another condominium by the trustee; specifying an exclusion; providing an effective date.

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Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 718.117, Florida Statutes, is amended to read:

(Substantial rewording of section. See s. 718.117, F.S., for present text.)
718.117 Termination of condominium.--

(1) LEGISLATIVE FINDINGS.--The Legislature finds that it is contrary to the public policy of this state to require the continued operation of a condominium when to do so would constitute economic waste or when the ability to do so is made impossible by law or regulation. The provisions of this section shall apply to all condominiums in this state in existence on or after the effective date of this act.

(2) TERMINATION BECAUSE OF ECONOMIC WASTE OR IMPOSSIBILITY.--

(a) Notwithstanding any provision to the contrary in the declaration, the condominium form of ownership of a property may be terminated by a plan of termination approved by the lesser of a majority of the total voting interests or as otherwise provided in the declaration for approval of termination, in the following circumstances:

1. When the total estimated cost of repairs necessary to restore the improvements to their former condition or bring them into compliance with applicable laws or regulations exceeds the combined fair market value of all units in the condominium after completion of the repairs; or

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51 2. When it becomes impossible to operate or reconstruct a
52 condominium in its prior physical configuration because of land-
53 use laws or regulations.

54 (b) Notwithstanding paragraph (a), a condominium in which
55 75 percent or more of the units are timeshare units may only be
56 terminated pursuant to a plan of termination approved by 80
57 percent of the total voting interests of the association and the
58 holders of 80 percent of the original principal amount of
59 outstanding recorded mortgage liens of timeshare estates in the
60 condominium, unless the declaration provides for a lower voting
61 percentage.

62 (3) OPTIONAL TERMINATION.--Except as provided in
63 subsections (2) and (4) or unless the declaration provides for a
64 lower percentage, the condominium form of ownership of the
65 property may be terminated pursuant to a plan of termination
66 approved by at least 80 percent of the total voting interests of
67 the condominium. This subsection does not apply to condominiums
68 in which 75 percent or more of the units are timeshare units.

69 (4) JURISDICTION.--

70 (a) If 80 percent of the total voting interests fail to
71 approve the plan of termination but fewer than 20 percent of the
72 total voting interests vote to disapprove of the plan, the
73 circuit court shall have jurisdiction to entertain a petition by
74 the association or by one or more unit owners and approve the
75 plan of termination, and the action may be a class action.

76 (b) All unit owners and the association must be parties to
77 the action. The action may be brought against the nonconsenting
78 unit owners as a class action. Service of process on unit owners

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79 may be by publication, but the plaintiff must furnish each unit
80 owner not personally served with process a copy of the petition
81 and plan of termination, and after entry of judgment, a copy of
82 the final decree of the court, by mail at the owner's last known
83 address.

84 (c) After the consideration of whether the rights and
85 interests of unit owners are equitably set forth in the plan of
86 termination as required by this section, the plan of termination
87 may be approved or rejected by the court. Consistent with the
88 provisions of this section, the court may also modify the plan
89 of termination to provide for an equitable distribution of the
90 interests of unit owners prior to approving the plan of
91 termination.

92 (d) This subsection does not apply to condominiums in
93 which 75 percent or more of the units are timeshare units.

94 (5) EXEMPTION.--A plan of termination is not an amendment
95 subject to s. 718.110(4).

96 (6) MORTGAGE LIENHOLDERS.--Notwithstanding any provision
97 to the contrary in the declaration or this chapter, approval of
98 a plan of termination by the holder of a recorded mortgage lien
99 affecting a condominium parcel in which fewer than 75 percent of
100 the units are timeshare units is not required unless the plan of
101 termination will result in less than the full satisfaction of
102 the mortgage lien affecting the parcel.

103 (7) POWERS IN CONNECTION WITH TERMINATION.--The
104 association shall continue in existence following approval of
105 the plan of termination, with all powers it had before approval
106 of the plan. Notwithstanding any contrary provision in the

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107 declaration or bylaws, after approval of the plan, the board has
108 the power and duty:

109 (a) To employ directors, agents, attorneys, and other
110 professionals to liquidate or conclude its affairs.

111 (b) To conduct the affairs of the association as necessary
112 for the liquidation or termination.

113 (c) To carry out contracts and collect, pay, and settle
114 debts and claims for and against the association.

115 (d) To defend suits brought against the association.

116 (e) To sue in the name of the association for all sums due
117 or owed to the association or to recover any of its property.

118 (f) To perform any act necessary to maintain, repair, or
119 demolish unsafe or uninhabitable improvements or other
120 condominium property in compliance with applicable codes.

121 (g) To sell at public or private sale or to exchange,
122 convey, or otherwise dispose of assets of the association for an
123 amount deemed to be in the best interests of the association,
124 and to execute bills of sale and deeds of conveyance in the name
125 of the association.

126 (h) To collect and receive rents, profits, accounts
127 receivable, income, maintenance fees, special assessments, or
128 insurance proceeds for the association.

129 (i) To contract and do anything in the name of the
130 association which is proper or convenient to terminate the
131 affairs of the association.

132 (8) NATURAL DISASTERS.--

133 (a) If, after a natural disaster, the identity of the
134 directors or their right to hold office is in doubt, if they are

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135 deceased or unable to act, if they fail or refuse to act, or if
136 they cannot be located, any interested person may petition the
137 circuit court to determine the identity of the directors or, if
138 found to be in the best interests of the unit owners, to appoint
139 a receiver to conclude the affairs of the association after a
140 hearing following notice to such persons as the court directs.

141 (b) The receiver shall have all powers given to the board
142 pursuant to the declaration, bylaws, and subsection (7), and any
143 other powers that are necessary to conclude the affairs of the
144 association and are set forth in the order of appointment. The
145 appointment of the receiver is subject to the bonding
146 requirements of such order. The order shall also provide for the
147 payment of a reasonable fee to the receiver from the sources
148 identified in the order, which may include rents, profits,
149 incomes, maintenance fees, or special assessments collected from
150 the condominium property.

151 (9) PLAN OF TERMINATION.--The plan of termination must be
152 a written document executed in the same manner as a deed by unit
153 owners having the requisite percentage of voting interests to
154 approve the plan and by the termination trustee. A copy of the
155 proposed plan of termination shall be given to all unit owners,
156 in the same manner as for notice of an annual meeting, at least
157 14 days prior to the meeting at which the plan of termination is
158 to be voted upon or prior to or simultaneously with the
159 distribution of the solicitation seeking execution of the plan
160 of termination or written consent to or joinder in the plan. A
161 unit owner may document assent to the plan of termination by
162 executing the plan or by consent to or joinder in the plan in

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163 the manner of a deed. A plan of termination and the consents or
164 joinders of unit owners and, if required, consents or joinders
165 of mortgagees must be recorded in the public records of each
166 county in which any portion of the condominium is located. The
167 plan of termination is effective only upon recordation or at a
168 later date specified in the plan.

169 (10) PLAN OF TERMINATION; REQUIRED PROVISIONS.--The plan
170 of termination must specify:

171 (a) The name, address, and powers of the termination
172 trustee.

173 (b) A date after which the plan of termination is void if
174 it has not been recorded.

175 (c) The interests of the respective unit owners in the
176 association property, common surplus, and other assets of the
177 association, which shall be the same as the respective interests
178 of the unit owners in the common elements immediately before the
179 termination, unless otherwise provided in the declaration.

180 (d) The interests of the respective unit owners in any
181 proceeds from any sale of the condominium property. The plan of
182 termination may apportion those proceeds pursuant to any of the
183 methods prescribed in subsection (12). If, pursuant to the plan
184 of termination, condominium property or real property owned by
185 the association is to be sold following termination, the plan
186 must provide for the sale and may establish any minimum sale
187 terms.

188 (e) Any interests of the respective unit owners in any
189 insurance proceeds or condemnation proceeds that are not used
190 for repair or reconstruction at the time of termination. Unless

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191 the declaration expressly addresses the distribution of
192 insurance proceeds or condemnation proceeds, the plan of
193 termination may apportion those proceeds pursuant to any of the
194 methods prescribed in subsection (12).

195 (11) PLAN OF TERMINATION; OPTIONAL PROVISIONS; CONDITIONAL
196 TERMINATION.--

197 (a) The plan of termination may provide that each unit
198 owner retains the exclusive right of possession to the portion
199 of the real estate that formerly constituted the unit, in which
200 case the plan must specify the conditions of possession.

201 (b) In the case of a conditional termination, the plan
202 must specify the conditions for termination. A conditional plan
203 will not vest title in the termination trustee until the plan
204 and a certificate executed by the association with the
205 formalities of a deed, confirming that the conditions in the
206 conditional plan have been satisfied or waived by the requisite
207 percentage of the voting interests, have been recorded.

208 (12) ALLOCATION OF PROCEEDS OF SALE OF CONDOMINIUM
209 PROPERTY.--

210 (a) Unless the declaration expressly provides for the
211 allocation of the proceeds of sale of condominium property, the
212 plan of termination must first apportion the proceeds between
213 the aggregate value of all units and the value of the common
214 elements, based on their respective fair-market values
215 immediately before the termination, as determined by one or more
216 independent appraisers selected by the association or
217 termination trustee.

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218 (b) The portion of proceeds allocated to the units shall
219 be further apportioned among the individual units. The
220 apportionment is deemed fair and reasonable if it is determined
221 by the unit owners approving the plan of termination by any of
222 the following methods:

223 1. The respective values of the units based on the fair-
224 market values of the units immediately before the termination,
225 as determined by one or more independent appraisers selected by
226 the association or termination trustee;

227 2. The respective values of the units based on the most
228 recent market value of the units before the termination, as
229 provided in the county property appraiser's records; or

230 3. The respective interests of the units in the common
231 elements specified in the declaration immediately before the
232 termination.

233 (c) The methods of apportionment in paragraph (b) do not
234 prohibit any other method of apportioning the proceeds of sale
235 allocated to the units agreed upon in the plan of termination.
236 The portion of the proceeds allocated to the common elements
237 shall be apportioned among the units based upon their respective
238 interests in the common elements as provided in the declaration.

239 (d) Liens that encumber a unit shall be transferred to the
240 proceeds of sale of the condominium property and the proceeds of
241 sale or other distribution of association property, common
242 surplus, or other association assets attributable to such unit
243 in their same priority. The proceeds of any sale of condominium
244 property pursuant to a plan of termination may not be deemed to
245 be common surplus or association property.

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246 (13) TERMINATION TRUSTEE.--The association shall serve as
247 termination trustee unless another person is appointed in the
248 plan of termination. If the association is unable, unwilling, or
249 fails to act as trustee, any unit owner may petition the court
250 to appoint a trustee. Upon recording or at a later date
251 specified in the plan, title to the condominium property vests
252 in the trustee. Unless prohibited by the plan, the termination
253 trustee shall be vested with the powers given to the board
254 pursuant to the declaration, bylaws, and subsection (7). If the
255 association is not the termination trustee, the trustee's powers
256 shall be coextensive with those of the association to the extent
257 not prohibited in the plan of termination or the order of
258 appointment. If the association is not the termination trustee,
259 the association shall transfer any association property to the
260 trustee. If the association is dissolved, the trustee shall also
261 have such other powers necessary to conclude the affairs of the
262 association.

263 (14) TITLE VESTED IN TERMINATION TRUSTEE.--If termination
264 is pursuant to a plan of termination under subsection (2) or
265 subsection (3), the unit owners' rights and title as tenants in
266 common in undivided interests in the condominium property vest
267 in the termination trustee when the plan is recorded or at a
268 later date specified in the plan. The unit owners thereafter
269 become the beneficiaries of the proceeds realized from the plan
270 of termination. The termination trustee may deal with the
271 condominium property or any interest therein if the plan confers
272 on the trustee the authority to protect, conserve, manage, sell,
273 or dispose of the condominium property. The trustee, on behalf

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274 of the unit owners, may contract for the sale of real property,
275 but the contract is not binding on the unit owners until the
276 plan is approved pursuant to subsection (2) or subsection (3).

277 (15) NOTICE.--

278 (a) Within 30 days after a plan of termination has been
279 recorded, the termination trustee shall deliver by certified
280 mail, return receipt requested, notice to all unit owners,
281 lienors of the condominium property, and lienors of all units at
282 their last known addresses that a plan of termination has been
283 recorded. The notice shall include the book and page number of
284 the public records in which the plan was recorded, notice that a
285 copy of the plan shall be furnished upon written request, and
286 notice that the unit owner or lienor has the right to contest
287 the fairness of the plan.

288 (b) The trustee, within 90 days after the effective date
289 of the plan, shall provide to the division a certified copy of
290 the recorded plan, the date the plan was recorded, and the
291 county, book, and page number of the public records in which the
292 plan was recorded.

293 (16) RIGHT TO CONTEST.--A unit owner or lienor may contest
294 a plan of termination by initiating a summary procedure pursuant
295 to s. 51.011 within 90 days after the date the plan is recorded.
296 A unit owner or lienor who does not contest the plan within such
297 90-day period is barred from asserting or prosecuting a claim
298 against the association, the termination trustee, any unit
299 owner, or any successor in interest to the condominium property.
300 In an action contesting a plan of termination, the person
301 contesting the plan has the burden of pleading and proving that

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302 the apportionment of the proceeds from the sale among the unit
303 owners was not fair and reasonable. The apportionment of sale
304 proceeds is presumed fair and reasonable if it was determined
305 pursuant to the methods prescribed in subsection (12). The court
306 shall adjudge the rights and interests of the parties and order
307 the plan of termination to be implemented if it is fair and
308 reasonable. The court shall void a plan that is determined not
309 to be fair and reasonable. In such action, the prevailing party
310 may recover reasonable attorney's fees and costs.

311 (17) DISTRIBUTION.--

312 (a) Following termination of the condominium, the
313 condominium property, association property, common surplus, and
314 other assets of the association shall be held by the termination
315 trustee, as trustee for unit owners and holders of liens on the
316 units, in their order of priority.

317 (b) Not less than 30 days prior to the first distribution,
318 the termination trustee shall deliver by certified mail, return
319 receipt requested, a notice of the estimated distribution to all
320 unit owners, lienors of the condominium property, and lienors of
321 each unit at their last known addresses stating a good-faith
322 estimate of the amount of the distributions to each class and
323 the procedures and deadline for notifying the termination
324 trustee of any objections to the amount. The deadline must be at
325 least 15 days after the date the notice was mailed. The notice
326 may be sent with or after the notice required by subsection
327 (15). If a unit owner or lienor files a timely objection with
328 the termination trustee, the trustee does not have to distribute
329 the funds and property allocated to the respective unit owner or

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330 lienor until the trustee has had a reasonable time to determine
331 the validity of the adverse claim. In the alternative, the
332 trustee may interplead the unit owner, lienor, and any other
333 person claiming an interest in the unit and deposit the funds
334 allocated to the unit in the court registry, at which time the
335 condominium property, association property, common surplus, and
336 other assets of the association are free of all claims and liens
337 of the parties to the suit. In an interpleader action, the
338 trustee and prevailing party may recover reasonable attorney's
339 fees and costs and court costs.

340 (c) The proceeds of any sale of condominium property or
341 association property and any remaining condominium property or
342 association property, common surplus, and other assets shall be
343 distributed in the following priority:

344 1. To pay the costs of implementing the plan of
345 termination, including demolition, removal, and disposal fees,
346 termination trustee's fees and costs, accounting fees and costs,
347 and attorney's fees and costs.

348 2. To lienholders of liens recorded prior to the recording
349 of the declaration.

350 3. To lienholders of liens of the association which have
351 been consented to under s. 718.121(1).

352 4. To creditors of the association, as their interests
353 appear.

354 5. To unit owners, the proceeds of any sale of condominium
355 property subject to satisfaction of liens on each unit in their
356 order of priority, in shares specified in the plan of
357 termination, unless objected to by a unit owner or lienor.

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358 6. To unit owners, the remaining condominium property,
359 subject to satisfaction of liens on each unit in their order of
360 priority, in shares specified in the plan of termination, unless
361 objected to by a unit owner or a lienor as provided in paragraph
362 (b).

363 7. To unit owners, the proceeds of any sale of association
364 property, the remaining association property, common surplus,
365 and other assets of the association, subject to satisfaction of
366 liens on each unit in their order of priority, in shares
367 specified in the plan of termination, unless objected to by a
368 unit owner or a lienor as provided in paragraph (b).

369 (d) After determining that all known debts and liabilities
370 of an association in the process of termination have been paid
371 or adequately provided for, the termination trustee shall
372 distribute the remaining assets pursuant to the plan of
373 termination. If the termination is by court proceeding or
374 subject to court supervision, the distribution may not be made
375 until any period for the presentation of claims ordered by the
376 court has elapsed.

377 (e) Assets held by an association upon a valid condition
378 requiring return, transfer, or conveyance, which condition has
379 occurred or will occur, shall be returned, transferred, or
380 conveyed in accordance with the condition. The remaining
381 association assets shall be distributed pursuant to paragraph
382 (c).

383 (f) Distribution may be made in money, property, or
384 securities and in installments or as a lump sum, if it can be
385 done fairly and ratably and in conformity with the plan of

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termination. Distribution shall be made as soon as is reasonably
consistent with the beneficial liquidation of the assets.

(18) ASSOCIATION STATUS.--The termination of a condominium
does not change the corporate status of the association that
operated the condominium property. The association continues to
exist to conclude its affairs, prosecute and defend actions by
or against it, collect and discharge obligations, dispose of and
convey its property, and collect and divide its assets, but not
to act except as necessary to conclude its affairs.

(19) CREATION OF ANOTHER CONDOMINIUM.--The termination of
a condominium does not bar the creation, by the termination
trustee, of another condominium affecting any portion of the
same property.

(20) EXCLUSION.--This section does not apply to the
termination of a condominium incident to a merger of that
condominium with one or more other condominiums under s.
718.110(7).

Section 2. This act shall take effect July 1, 2006.

HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 1

Bill No. HB 543

COUNCIL/COMMITTEE ACTION

ADOPTED _____ (Y/N)
ADOPTED AS AMENDED _____ (Y/N)
ADOPTED W/O OBJECTION _____ (Y/N)
FAILED TO ADOPT _____ (Y/N)
WITHDRAWN _____ (Y/N)
OTHER _____

Council/Committee hearing bill: Business Regulation

Representative(s) Goodlette offered the following:

Amendment

Remove line 31, and insert:

(1) LEGISLATIVE FINDINGS.--The Legislature finds that
condominiums are created as authorize by statute. In
circumstances that may create economic waste, areas of blight
or obsolescence of the condominium property for its intended
use, and lower property tax values resulting from such
circumstances, the Legislature further finds that it is the
public policy of this state to provide by statute a method to
preserve the value of the property interests and the rights of
alienation thereof that owners have in the condominium
property both before and after termination. The Legislature
further finds that it

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HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 2

Bill No. **HB 543**

COUNCIL/COMMITTEE ACTION

ADOPTED _____ (Y/N)
ADOPTED AS AMENDED _____ (Y/N)
ADOPTED W/O OBJECTION _____ (Y/N)
FAILED TO ADOPT _____ (Y/N)
WITHDRAWN _____ (Y/N)
OTHER _____

Council/Committee hearing bill: Business Regulation

Representative(s) Goodlette offered the following:

Amendment

Remove line 102, and insert:

the mortgage lien affecting the condominium parcel. Should
such approval be required and not given and should the holder
of a recorded mortgage lien object to the plan of termination,
such lienor may contest the plan as provided in subsection 16)
of this section. At the time of sale, the lien shall be
transferred to the proportionate share of the proceeds
assigned to the condominium parcel in the plan of termination
or as subsequently modified by the court.

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HOUSE AMENDMENT FOR COUNCIL/COMMITTEE PURPOSES

Amendment No. 3

Bill No. **HB 543**

COUNCIL/COMMITTEE ACTION

ADOPTED _____ (Y/N)
ADOPTED AS AMENDED _____ (Y/N)
ADOPTED W/O OBJECTION _____ (Y/N)
FAILED TO ADOPT _____ (Y/N)
WITHDRAWN _____ (Y/N)
OTHER _____

1 Council/Committee hearing bill: Business Regulation

2 Representative(s) Goodlette offered the following:

3
4 **Amendment**

5 On line 308, after the word "reasonable" insert:

6 The court may modify the plan to apportion the proceeds in a
7 fair and reasonable manner as required by this section based
8 upon the proceedings and order the modified plan of
9 termination to be implemented.

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